90-189

No. _____

In The

Supreme Court of the United States

October Term, 1990

FRANK LANDRY, et al.,

Cross-Petitioners

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO, TACA INTERNATIONAL AIRLINES and CHARLES J. HUTTINGER,

Cross-Respondents

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the application of the six-month Statute of Limitation, in 10(b) of the NLRA, is correct when former employees file suit against a labor union for violation of its duty of fair representation and against their former employer for its breach of the collective bargaining agreement even though the facts do not fit the *DelCostello* holding and this Court has recently revisited *DelCostello* in *Chauffeurs* to find the trust analogy a closer fit for the breach of duty of fair representation action?

LIST OF PARTIES TO THE PROCEEDINGS

The Air Line Pilots Association, International, AFL-CIO and Charles J. Huttinger were defendants in the district court, appellees in the court of appeals and are cross-respondents in this court.

TACA International Airlines, S.A. was a defendant in the district court, an appellee in the court of appeals and is a cross-respondent in this court.

Fringe Benefit Administrators, Ltd. was a defendant in the district court, and intervenor in the court of appeals and is a respondent in this court.

The plaintiffs in the district court, appellants in the court of appeals, cross-petitioners and respondents in this court, are: Frank Landry, Jules Corona, Charles South, Robert A. Massa, Don Johnson, T.Q. Howard, the Succession and Beneficiaries of Joe Hass, Walter Keller, Don Jenkins and his former wife, Zeda Jenkins, Emile Cerisier, and M. Letona. The following were plaintiffs in the district court but were not appellants in the court of appeals, and are not cross-petitioners in the court: Thomas Brignac, Robert Lukenbell, Bert Haffner, and Gary Zriek.

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Frank Landry, Jules Corona, Charles South, Robert A. Massa, Don Johnson, T.Q. Howard, the Succession and Beneficiaries of Joe Hass, Walter Keller, Don Jenkins and his former wife, Zeda Jenkins, Emile Cerisier, and M. Letona ("the airlines pilots" or "TACA Pilots") cross-petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgment in *Landry, et al. v. Air Line Pilots Association International, et al.*, No. 88-3363 (5th Cir., Jan. 31, 1990), modified April 27, 1990.

OPINIONS BELOW

The opinion of the court of appeals, which has not yet been officially reported, is reproduced at App. A[1]. The unreported opinions of the court of appeals on petitions for rehearing are reproduced at App. H and App. I. The unreported opinions of the United States District Court for the Eastern District of Louisiana are reproduced at App. C through App. E. Set out as Appendix AA is the opinion of the District Court (omitted from ALPA's brief) regarding it having to consider the equitable tolling argument on the request of the airline pilots and that such a request was not sanctionable.

JURISDICTION

The opinion and judgment of the court of appeals were entered on January 31, 1990. Timely petitions for rehearing were granted in part and denied in part on April 27, 1990. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

This Cross-Petition is filed in accordance with Rule 13.5 of the Rules of the Supreme Court of the United States adopted December 5, 1989, effective January 1, 1990.

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[1] "App. A-E" refers to the appendix annexed to the Original Petition for issuance of a writ of certiorari filed in this matter by the Airline Pilots Association (ALPA).

"R. ___" refers to the page number of the Record on Appeal to the Fifth Circuit Court of Appeals.

STATUTES INVOLVED

Set out in Appendix BB are the relevant portions of the following acts:

1. § 301 of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. § 185(a) & (b) (1982 ed.).
2. National Labor Relations Act, 49 Stat. 449, 29 U.S.C., § 159(a) & (b) (1982 ed.).
3. 10(b) of the National Labor Relations Act, 49 Stat. 453, at amended, 29 U.S.C., § 160(b).
4. Rules of Decision Act, Rev. Stat. § 721, 1 Stat. 92, the First Congress, 1789; 28 U.S.C. § 1652.

STATEMENT OF THE CASE

The airline pilots brought this suit against TACA and ALPA alleging that ALPA violated their duty of fair representation, TACA violated the collective bargaining agreement and both violated RICO along with Charles J. Huttinger. They also alleged that TACA, ALPA and FBA breached their fiduciary duties under ERISA in the implementation and Administration of the Pilots retirement plan.

THE FACTS

The history necessary to understand the illicit motivation of the defendants in this case dates back to at least the early 1960's. The plaintiffs are former pilots employed by TACA Airlines, and represented by their union, ALPA. Pursuant to a Letter of Agreement dated February 24, 1982, which supplemented and modified the

existing collective bargaining agreement, ALPA and TACA purportedly agreed to establish a retirement plan for TACA pilots. In addition, TACA agreed to make monthly contributions commencing March 31, 1982. Into a trust account in an institution designated by ALPA's bargaining representative, Charles Huttinger, also a TACA pilot.

In 1983, while negotiating a collective bargaining agreement, TACA tried to breach its existing agreement, withdrew its recognition of ALPA, and impose new working conditions on its pilots. Only a court ordered injunction prevented TACA from doing so. *See Air Line Pilots Association v. TACA International Airlines, S.A.*, 748 F.2d 965 (5th Cir. 1984) *cert. denied*, 471 U.S. 1100 (1985).

TACA for years sought to move its base of operations from New Orleans to El Salvador, through whatever means, legal or illegal, available. Some sixteen years ago, the Fifth Circuit Court of Appeals affirmed a determination that TACA was acting in bad faith in order to undermine collective bargaining. *Ruby v. TACA International Airlines, S.A.*, 439 F.2d 1359 (5th Cir. 1971). In the Spring of 1985 ALPA was faced with threats of multi-million dollar litigation from TACA, for ALPA directed labor sabotage of TACA's equipment. In order to meet TACA's threats and quickly settle the negotiations (no matter how disfavorable to the pilots) Huttinger conspired with the ALPA election board to have an election thrown out on a procedural irregularity in voting. On July 15, 1985 a new election was certified, and this time Huttinger was installed as the new Captain Representative. Nine days later Huttinger negotiated the Pilots Agreement.

Huttinger (who due to medical problems could not fly) had lost his status to negotiate, to vote, to represent the union, and was to be automatically severed from the employment of TACA after five years of sick status, all in accordance with the 1980 contract. To avoid loss of seniority benefits, and the lump sum payments he could receive, Huttinger refused to negotiate for ALPA unless all of the foregoing was restored to him each month, before negotiations began. TACA agreed to make these alleged payments to Huttinger to induce ALPA to negotiate. The union membership was unaware of this.

On July 1, 1985, the pilots received a telegram from ALPA, which restates accusations that some pilots are intentionally sabotaging airline equipment. TACA threats to prosecute and to institute civil suit followed and were only dropped after Huttinger agreed to TACA's terms. Because, according to ALPA's president, ALPA was in no position to afford protracted litigation.

On July 3, 1985, Charles Huttinger writes the pilots, informing them that "TACA's despicable intentions are clear", TACA is "determined to destroy ALPA at TACA, escape U.S. laws, and move to [El] Salvador". Negotiations had completely broken down and would not resume for another thirty (30) days.

Huttinger describes TACA's proposal to cease contributions to the pension plan as illegal, unfair, and ridiculous. "Regardless of the outcome of these negotiations, TACA must contribute to the plan." The plan "should not be the subject of these negotiations."

On July 24, 1985, the pilots are informed by Huttinger that the association has reached an agreement with TACA. A copy of the agreement is to be sent to them

shortly. (No details are provided) The tentative agreement is "(subject to ratification)". Approximately a week later (August 3, 1985), the pilots are informed by TACA that they have twelve (12) days to quit and receive severance and retirement benefits, or stay on and move to El Salvador. The pilots must decide which option they choose. If they make no decision, or protest, then they lose severance pay and other benefits and they lose the right to continue employment. No mention is made of ratification.

The July 24, 1985 "Pilots' Agreement" superseded the 1980 collective bargaining agreement, and provided that ALPA would not hinder or oppose TACA's relocation outside the United States. The agreement forced the pilots to accept termination and retirement unless they chose to move themselves to El Salvador.

TACA's intentions were obvious. It only wanted the senior experienced American captains to stay on long enough to help keep the airline running. Once the cheaper paid Salvadorian pilots gained enough experience to be promoted as captains, the American captains would be expendable.

Although the permanent contract made a token offer to keep all pilots on, it was in fact not even that. It was a material, intentional misrepresentation of fact. Fredrico Bloch, TACA's vice-president, informed one co-pilot, Walter Keller, that TACA was not interested in keeping any North American co-pilots.

Therefore, TACA not only misrepresented its desire to employ all pilots in the August 3, 1985 letter, it also misrepresented the same stated desire to employ all pilots in the July 24, 1985 bargaining agreement.

The move up to larger aircraft had the base not relocated, along with yearly increases in seniority, meant that many pilots were anticipating $120,000 to $200,000 salaries, plus benefits, prior to mandatory retirement at age 60. Instead they were forced by the fraudulent acts of ALPA, TACA and Huttinger into accepting one time lump sum severance pay offs ranging from about $16,000 to $39,000, and nonexistent retirement pensions.

Working under too short a time period to make an informed decision, the pilots reluctantly agreed to accept mediocre severance benefits, assuming that they had the substantial portion of their retirement plan available. In early 1986, when no benefits were forthcoming, several pilots tried contacting ALPA and Huttinger. The pilots were told that because TACA ceased its contributions in July 1985, the plan automatically terminated and their retirement benefits were unavailable. To date, the pilots have received no funds from the retirement system. Despite repeated requests, Charles Huttinger refused to give out any information. As it turns out, one pilot is receiving retirement benefits – Charles Huttinger.[2] It is believed that Huttinger began receiving benefits from the fund in November of 1985, two months after the plan had terminated.

Both Huttinger and TACA claimed they were making every effort to completely document the plan pursuant to the Letter of Agreement dated February 24, 1982. In fact, neither TACA, ALPA nor Huttinger made any effort to

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[2] One other pilot, R.B. Hall, is receiving benefits. He retired in June of 1982, and applied long before the July, 1985 agreement was executed.

document the trust agreement as an ERISA Plan. They only moved forward in April 1985, when this Court rejected TACA's effort to unilaterally move its base and abrogate the collective bargaining agreement by denying TACA's writ application, effectively sustaining Judge Feldman's injunction.

The pension plan was created with a fraudulent eye toward quickly terminating it. Documented in July, 1985 with a retroactive establishment date of February 1, 1982, but then immediately made the object of implicit termination by the July 24, 1985, Pilots' Agreement (a fact unknown to the airline pilots), this plan served only one pilot – Huttinger. Obviously, as head of the retirement committee Huttinger was in a position of control. Huttinger was treated as vested in the plan although his status was contractually terminated.

Required notices of termination of the plan upon cessation of contributions by TACA were not given by ALPA, the plan trustee, FBA, the plan administrator and mandatory fiduciary, or TACA, the employer.

Huttinger moved quickly to protect himself. In return for TACA's monthly restoration of Huttinger to the Active Seniority List, his hospital benefits and sick pay, Huttinger negotiated a quick agreement substantially favorable to TACA. TACA was relieved of its heretofore "non-negotiable" obligation to continue funding the plan. By keeping the other pilots in the dark, and applying for benefits timely, Huttinger could assure himself of getting paid. He quickly filed for retirement while he, ALPA, TACA and the FBA intentionally neglected their duty to notify the pilots of the consequences of the termination of

TACA contributions to the plan under the proposed Pilots' Agreement. ALPA, the plan trustee, instructed FBA to pay Huttinger and he began to collect retirement pay at age 56 while older men were being deprived of their jobs and to this date their hard earned retirement pay.

PROCEEDINGS BELOW

i. District Court

Only July 23, 1986, (R. 1) the plaintiffs filed a complaint against the Airline Pilots Association (ALPA), Fringe Benefits Administrators, Ltd. (FBA) and TACA International Airlines, S.A (TACA) for violations of the Railway Labor Act (RLA) 45 U.S.C. 151, et seq., the National Labor Relations Act (NLRA), 29 U.S.C. 1001-1461 (ERISA) and La. C.C. Art. 2315, including claims of fraud and collusion by defendants requesting damages and a declaratory judgment.

FBA filed an answer on October 22, 1986, (R. 261). ALPA and TACA filed motions to dismiss. On January 13, 1987, (R. 383-386) the pilots noticed the depositions of Charles Huttinger and First National Bank, eventually postponed at the request of defendants. On February 10, 1987, (R. 408) the pilots filed motions to transfer and consolidate this matter in the injunction proceeding, previously rendered by Judge Feldman. The defendants objected. On March 27, 1987 the pilots' motion to transfer was denied. On March 11, 1987, (R. 464) the pilots filed a motion to amend the complaint adding a second count based on RICO violations and adding Charles Huttinger as a defendant. Over oppositions of ALPA and TACA, the

amended complaint was ordered filed on April 6, 1987, (R. 492)

In May, ALPA, TACA and Huttinger (R. 610) filed motions to dismiss the new complaint. The court, (R. 758) denied motions to dismiss without prejudice and ordered the pilots to file a RICO case statement, which was filed on August 25, 1987 (R. 764). November 18, 1987, (R. 1007) the defendants moved for protective orders to quash depositions of TACA, Huttinger and FBA which the pilots had noticed for October. On December 11, 1987, (R. 1104) the court granted the protective order.

On December 14, 1987, (R. 1108) the pilots filed a motion for the court to reconsider the application of tolling principles to the dismissal of their DFR claims. December 23, 1987, (R. 1117) the court denied a request by the pilots to file supplemental brief in support of motion to reconsider. On February 29, 1988 the court denied the pilots' motion for reconsideration and ordered the pilots to respond to defendants' request for sanctions. On March 17, 1988 the court rendered reasons dismissing the pilots' new claims against TACA, ALPA and Huttinger. On April 28, 1988 the court entered a Rule 54(b) judgment dismissing ALPA and TACA, and on May 4, 1988, one dismissing Huttinger.

ii. Court of Appeals

The court of appeals affirmed dismissal of the DFR/breach of contract claim on limitations grounds. The court found no basis for equitable tolling, as plaintiffs were "on inquiry notice of the labor law claims they

raised in this suit in the spring or summer of 1985." App. A, 15a.

With respect to the RICO claim, the court of appeals affirmed the dismissal of TACA but reversed as to ALPA and Huttinger.

The court also reversed the grant of summary judgment on the ERISA claim as to ALPA and TACA.

The case was remanded for trial on the merits.

REASONS FOR GRANTING THE WRIT

The case presents issues of great importance which merit this Court's review.

I. THE APPLICATION OF THE SIX-MONTH STATUTE OF LIMITATIONS OF SECTION 10(b) OF THE NLRA TO CLAIMS WHICH ARE AGAINST THE EMPLOYER AND UNION, BUT WHICH ARE NOT ANALOGOUS TO ARBITRATION CLAIMS, CONFLICTS WITH DECISIONS OF THIS COURT AND PRESENTS AN ISSUE OF COMPELLING IMPORTANCE WARRANTING THIS COURT'S REVIEW.

A. The rationale of *DelCostello* for the application of the six-month Statute of Limitation does not apply to the plaintiff's claim.

The Fifth Circuit in applying § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), which has a six-month limitation period concluded that this case presented a "hybrid" action in tune with this court's decision of *DelCostello v. International Bhd. of Teamsters*, 462 U.S., 151, 103 S.Ct. 2281 (1983). Their conclusion has precluded

the pilots from any avenue of relief based upon their DFR claim or Section 301 of the LMRA. As will be shown below, their conclusion is in conflict with this court's policy reasons for borrowing the six-month limitation of the NLRA as stated and affirmed in *DelCostello, supra.*

This Court in *DelCostello, supra,* reasoned that it would not apply the state statutes of limitation, because the hybrid action against an employer and union has no close analogy in ordinary state law. This decision sought to reason around the Congressional mandate of the Rules of Decision Act, Rev. Stat. § 721, 1 Stat. 92, by looking to the nature of the claims brought against the employer and the union.

This Court ruled that it had "available a federal statute of limitations actually designed to accommodate a balance of interests very similar to that at stake here – a statute, that is, in fact, an analogy to the present lawsuit more apt than any of the suggested state law parallels. . . . § 10(b) of the National Labor Relations Act . . . " *DelCostello, supra,* 2293.

The facts of this case simply are not a close analogy to *DelCostello, supra,* and therefore not a proper analogy to § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). Here, the employees were not involved in the grievance machinery as in *DelCostello, supra.* Instead, the defendants first contracted those rights away, and then, rather than risk an unfavorable vote when extended for the promised right of ratification, the defendants misrepresented to the airline pilots that they had no choice but to accept the TACA offer of resigning and accepting

meager severance benefits. The employees only recourse for redress was the courts.

This Court's reason for selecting § 10(b) as the most analogous action was the desire to apply a "limitations period attuned to what it viewed as the proper balance between the national interest in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective bargaining system." *DelCostello*, supra, 462 U.S. 170, quoting *United Parcel Service v. Mitchell*, 452 U.S. 56 (1981), 70-71. The employees herein were not allowed to bargain or grieve, or for that matter to settle. Instead they were told to resign, because they had no other choice – moving to El Salvador not being a realistic alternative. Simply, the employer and union executed an agreement and through their fraud and deceit were able to effect an illegal decertification of the union,[3] thereby allowing TACA to

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[3] After TACA and ALPA executed the July 24, 1985 Pilots Agreement, the ALPA representative assured the pilots of a right to vote on the agreement. Approximately one week later, on August 3, 1985, TACA advised the pilots that they must choose in twelve (12) days either severance pay and retirement benefits, or move to El Salvador to work for TACA. The ALPA representative then represented to the pilots that they had no choice but to accept the TACA offer of August 3, 1985. Based on these misrepresentations, all of the United States pilots chose the severance offered by TACA. This implicitly gave effect to the Pilots Agreement of July 24, 1985 which provided that ALPA was to no longer represent the TACA pilots after August 31, 1985, all in violation of the judicially prescribed methods regulating the termination of collective bargaining representation and the provisions of 29 U.S.C. § 159(a) & (b).

circumvent the previously issued injunction[4] preventing TACA from moving its base to El Salvador.

B. This Court has recently revisited *DelCostello* in *Chauffeurs*, (March 20, 1990) finding the DFR claim is more analogous to a trust claim.

In *Chauffeurs, Teamsters and Helpers, Local No. 391 vs. Terry, et al.*, U.S. Sup. Ct. No. 88-1719 (March 20, 1990), this Court was presented with the question of whether an employee who seeks relief in the form of back pay for a union's alleged breach of its duty of fair representation has a right to trial by jury. This Court revisited the application of the closest analogy of an action by an employee against the union and employer and stated that the "court in *DelCostello* did not consider the trust analogy, however." *Chauffeurs, supra*, p. 8.

This Court agreed with the union's argument that the employees' duty of fair representation action is comparable to an action by a trust beneficiary against a trustee for breach of fiduciary duty. The Court stated that "Just as a trust beneficiary can sue to enforce a contract entered into on his behalf by the trustee only if the trustee improperly refuses or neglects to bring an action against the third person, RESTATEMENT (Second) of TRUSTS,

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[4] Although ALPA was the plaintiff in obtaining the injunction issued against TACA in 1983 (affirmed by the Fifth Circuit Court of Appeals in 1984 and certiorari denied by this Court in 1985), and the lower courts have refused to reopen that case, the thrust of the injunction prohibiting the transfer of the TACA base without first complying with the RLA is the underlying basis for the pilots complaint in this action.

supra, § 282(2), so an employee can sue his employer for a breach of the collective bargaining agreement only if he shows that the union breached its duty of fair representation in its handling of the grievance, *DelCostello*, 463 U.S., at 163-164." *Chauffeurs* at p.8. It is because of this characteristic of the DFR claim that the trust analogy fits best.

As in the case of *Chauffeurs*, this Court should view this case as one that "is not typical; instead it is a claim consisting of discrete issues that would normally be brought as two claims, one against the employer and one against the union. . . . Consideration of the nature of the two issues in this hybrid action is therefore warranted" *Chauffeurs, supra*, p. 10, footnote 6. If this court treats each issue separately, it may conclude, as it did in *Chauffeurs*, that the § 301 issue is closely analogous to a breach of contract claim and the DFR action is closely analogous to a trust action. However, considering both issues as part of one action, the application of the trust analogy to both the § 301 issue and the DFR issue in this lawsuit would be correct.

Applying the trust analogy to the instant § 301 claim and the DFR claim would not do violence to those national policy reasons as stated in *DelCostello, supra*. This is particularly the case here because the employer and the union worked to collectively misrepresent the facts regarding the pilots choices and to induce them to sever their relationship with their employer and union, in order to illegally move the TACA base outside the jurisdiction of the United States.

The Louisiana Trust Code, L.S.A. 9:2234 has a one year limitation period for a beneficiary to bring an action

against the trustee. It is respectfully suggested that *Chauffeurs* implicitly requires that the Court allow the pilots in this case one year within which to file their hybrid DFR claim. Doing so, the Court would be allowing for filling claims during the shortest of available analogous state law actions promoting prompt resolution of labor law claims without doing violence to the Rules of Decision Act. Rev. Stat. § 721, 1 Stat. 92.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted. This case does not fit the parameters established for *DelCostello* type hybrid claims. More importantly, this Court has clearly expressed its intent to reconsider the *DelCostello* analogies in state law and considers the trust claim as most closely analogous, leading to a one year period for filing this suit and making the same timely filed.

Respectfully submitted,

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APPENDIX AA

MINUTE ENTRY
ARCENEAUX, J.
APRIL 11, 1988

CIVIL
ACTION
NO. 86-3196

FRANK LANDRY, ET AL

VERSUS

SECTION:
"K" (3)

AIRLINE PILOTS' ASSOCIATION,
INTERNATIONAL, AFL-CIO, ET AL

(Filed April 12, 1988)

On April 24, 1987, this Court dismissed the plaintiffs' claims against ALPA and TACA under the Railway Labor Act and ERISA. On March 17, 1988, the Court dismissed the plaintiffs' RICO claims against ALPA, TACA and Charles Huttinger. The only remaining issue between the plaintiffs and ALPA and TACA is the defendants' request for imposition of sanctions under Fed.R.Civ.P. 11 for the allegedly baseless filing of a motion for reconsideration of the Court's dismissal of the Railway Labor Act claims. The Court has determined that sanctions are not warranted in this matter and therefore denies the defendants' request.

In *Thomas v. Capital Sec. Services, Inc.*, 836 F.2d 866 (5th Cir. 1983), the Court of Appeals for the Fifth Circuit, on rehearing, restated its position as to the interpretation of Fed.R.Civ.P. 11. The Court dispensed with the requirement previously imposed upon district courts that specific findings of fact and conclusions of law be stated in every instance in which Rule 11 sanctions were requested. *Id.* at 883. Although the imposition of sanctions remains mandatory upon the finding of a violation of Rule 11, the appropriateness of a sanction is left to the

discretion of the district court, which is to impose the least severe sanctions adequate to serve the purpose of the Rule. *Id.* at 878.

The plaintiffs' motion for reconsideration, while somewhat cryptic, was not baseless. In dismissing the plaintiffs' Railway Labor Act claims, the Court specifically addressed the issue of the point of accrual of the plaintiffs' claims for relief, but did not specifically mention the words "equitable tolling." In view of the enormity of the plaintiffs' claims for damages and the sheer number of plaintiffs, the Court cannot say that the plaintiffs were wrong to file the motion for reconsideration. While the motion could have been prepared with greater care, the Court finds that it was not frivolous.

Accordingly,

IT IS ORDERED that the request of the defendants for the imposition of sanctions is DENIED.

/s/ George Arceneaux, Jr.
United States District Judge

APPENDIX BB

SUBCHAPTER IV – LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

§ 185. Suits by and against labor organizations venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

§ 158a. Providing facilities for operations of Federal Credit Unions

Provision by an employer of facilities for the operations of a Federal Credit Union on the premises of such employer shall not be deemed to be intimidation, coercion, interference, restraint or discrimination within the provisions of sections 157 and 158 of this title, or acts amendatory thereof.

Dec. 6, 1937, c. 3, § 5, 51 Stat. 5.

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§ 159. Representatives and elections – Exclusive representatives; employees' adjustment of grievances directly with employer

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Determination of bargaining unit by Board

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

§ 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944.

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29 U.S.C. § 160

Complaint and notice of hearing; answer; court rules of evidence applicable

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member,

agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

(2)

No. 90-189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FRANK LANDRY, *et al.*,
Cross-Petitioners,
v.
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO,
TACA INTERNATIONAL AIRLINES, S.A., *et al.*,
Cross-Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF CROSS-RESPONDENTS AIR LINE PILOTS ASSOCIATION, INTERNATIONAL AND CHARLES J. HUTTINGER IN OPPOSITION TO CROSS-PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the court below properly concluded that plaintiffs' claim that their union breached its duty of fair representation and their employer breached the collective bargaining agreement through negotiation and entry into a new collective bargaining agreement one year before suit was filed was barred by the six-month statute of limitations established in *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151 (1983)?

LIST OF PARTIES TO THE PROCEEDINGS

The Air Line Pilots Association, International, AFL-CIO and Charles J. Huttinger were defendants in the district court, appellees in the court of appeals, and are petitioners and cross-respondents in this Court.

TACA International Airlines, S.A. was a defendant in the district court, an appellee in the court of appeals, and is a respondent and cross-respondent in this Court.

Fringe Benefit Administrators, Ltd. was a defendant in the district court, an intervenor in the court of appeals, and is a respondent and cross-respondent in this Court.

The plaintiffs in the district court, appellants in the court of appeals, and respondents and cross-petitioners in this Court, are: Frank Landry, Jules Corona, Charles South, Robert A. Massa, Don Johnson, T.Q. Howard, Joe Hass, Walter Keller, Don Jenkins, Emile Cerisier, and M. Letona. The following were plaintiffs in the district court but were not appellants in the court of appeals and are not respondents or cross-petitioners in this Court: Thomas Brignac, Robert Lukenbill, Bert Haffner, and Gary Zyriek.

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AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO,
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BRIEF OF CROSS-RESPONDENTS AIR LINE PILOTS ASSOCIATION, INTERNATIONAL AND CHARLES J. HUTTINGER IN OPPOSITION TO CROSS-PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals is reported at 901 F.2d 404, and is reproduced at App. A.[1] The opinions of

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[1] "App. ——" refers to the appendix annexed to the petition for a writ of certiorari submitted by the Air Line Pilots Association, International and Charles J. Huttinger in this case (No. 89-1925). "R. ——" refers to the record on appeal.

the court of appeals on petitions for rehearing are reported at 901 F.2d 404, 437, and are reproduced at App. H and App. I. The unreported opinions of the United States District Court for the Eastern District of Louisiana are reproduced at App. C through App. E.

STATUTES INVOLVED

Set out in the attached appendix are the following provisions of the National Labor Relations Act ("NLRA"): 29 U.S.C. §§ 142(3) and 152(2), (3).

STATEMENT OF THE CASE

By this lawsuit, plaintiffs seek to set aside a collective bargaining agreement which they contend was unlawfully negotiated by their union, the Air Line Pilots Association, International ("ALPA"), in breach of its duty of fair representation ("DFR") and by their employer, TACA International Airlines, S.A. ("TACA"), in breach of the pre-existing collective bargaining agreement. The suit was not filed until one year after the challenged agreement was reached.

A. The Facts

The negotiations which are the subject of plaintiffs' suit began in October 1983, when TACA and ALPA sought to amend their existing collective bargaining agreement. Shortly thereafter, TACA attempted to relocate its pilot base to El Salvador, terminate the existing agreement, and withdraw its recognition of ALPA. App. A, 3a. On ALPA's motion, TACA's conduct was enjoined. *Id.* The Fifth Circuit affirmed, but held that TACA could "relocate its pilot base, and effect the other intended steps" provided that it did so in accordance with the bargaining requirements of the Railway Labor Act ("RLA"). *Air Line Pilots Ass'n, Int'l* v. *TACA Int'l Airlines, S.A.*, 748 F.2d 965, 972 (5th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985).

Negotiations continued in 1984 and 1985. With the assistance of the National Mediation Board, a July 24, 1985 "Pilots' Agreement" was reached under which, *inter alia*: ALPA would not oppose relocation of the pilot base to El Salvador after August 31, 1985; the TACA pilots could elect either to retain their positions with TACA at the relocated pilot base or accept a specified severance package; and TACA's funding of the TACA Pilots' Retirement Plan (the "Plan") would cease as of August 31, 1985, which, by the Plan's terms, would cause it to terminate. R.503-05. A December 17, 1985 "Settlement Agreement" resolved all disputes which had arisen under the Pilots' Agreement.

All of the plaintiffs who have joined in the cross-petition accepted and received the severance package.[2]

B. Proceedings Below

1. *District Court*

A year after the Pilots' Agreement was reached, 15 former TACA pilots (14 of whom had accepted the severance option and thereby received over $400,000, App. A, 5a; R.68, 576) filed a "hybrid" DFR/breach of contract claim against ALPA and TACA. Plaintiffs further alleged that TACA, ALPA and Fringe Benefit Adminis-

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[2] Virtually all of "The Facts" set forth at pp. 3-9 of the cross-petition ("cross-pet.") lack record support, and plaintiffs offer none. For example, plaintiffs' assertion that ALPA representative Huttinger "lost his status to negotiate, to vote, to represent the union," cross-pet., p. 5, was found by the court below to conflict with the uncontroverted evidence. App. A, 46a-47a. Plaintiffs' claim that it was only this Court's denial of certiorari in *ALPA v. TACA*, 748 F.2d 965, which prompted the execution of a written retirement plan in April 1985, cross-pet., p. 8, is spurious: certiorari was not denied until mid-May 1985. 471 U.S. 1100 (1985). Because these and numerous other factual misstatements do not "have a bearing on the question of what issues would properly be before the Court if certiorari were granted," Sup. Ct. R. 15.1, we refrain from burdening the Court with a line-by-line refutation of cross-petitioners' bald assertions.

trators, Ltd. ("FBA"), the Plan Administrator, violated ERISA by delaying implementation of the Plan, failing and refusing to disclose information about the Plan, and paying Plan benefits to Huttinger, but not to plaintiffs.

ALPA and TACA filed motions to dismiss or, alternatively, for summary judgment, contending that the DFR/breach of contract claim was barred by the statute of limitations and that plaintiffs had failed to state a viable ERISA claim against them. App. A, 7a.

While these motions were pending, plaintiffs made two attempts to sidestep the limitations bar to their hybrid claim. They first sought to have TACA found in contempt of the injunction issued in 1983 in *ALPA* v. *TACA* against relocation of the pilot base. This effort was rejected by the district court in *Landry* and by the judge who issued the injunction. App. A, 7a. Then, for the express purpose of avoiding the limitations bar to their labor law claim, R. 467, plaintiffs amended their complaint by repleading their RLA and ERISA claims as an alleged violation of RICO by ALPA and TACA, adding Huttinger as a defendant and trebling their damage request to nearly $100 million.

The district court dismissed the DFR/breach of contract claim as time-barred under *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151 (1983), and its progeny, because it was not filed within six months after the signing of the challenged 1985 ALPA-TACA agreements. App. E, 95a, 99a. The ERISA claim was dismissed as against TACA and ALPA because plaintiffs failed to demonstrate that these defendants were fiduciaries with respect to the matters of which plaintiffs complained. App. E, 95a-98a.

Thereafter, defendants moved to dismiss or, alternatively, for summary judgment as to the RICO claim. App. A, 8a. While those motions were pending, plaintiffs sought to resurrect their dismissed DFR/breach of

contract claim, *id.*, contending that the court had "overlooked the doctrine of equitable tolling." *Id.* The court rejected this effort as "entirely without merit," App. D, 86a, and as indicative of the "constantly evolving nature of plaintiffs' claims." R.1118. The following month, the district court dismissed the RICO claim. App. C.

2. ***Court of Appeals***

The court of appeals affirmed the grant of summary judgment to ALPA and TACA on the DFR/breach of contract claim on limitations grounds, App. A, 10a-12a, because that result was compelled by "[a] straight-forward application of *DelCostello* . . . ." App. A, 18a. The court further affirmed the trial court's determinations that there was no basis for equitably tolling the limitations period, App. A, 15a-16a, reopening the earlier ALPA-TACA litigation, App. A, 16a-17a, or permitting plaintiffs to escape the limitations bar by recharacterizing defendants' actions as an improper decertification of ALPA as bargaining representative (finding the last issue to be within the exclusive jurisdiction of the National Mediation Board). App. A, 17a.

The court affirmed dismissal of the RICO claim against TACA but reversed as to ALPA and Huttinger, App. A, 38a-62a, and reversed the grant of summary judgment on the ERISA claim. App. A, 18a-38a.

On matters not germane to the issues raised by the cross-petition, the court granted in part, and denied in part a petition for rehearing by ALPA and Huttinger. App. H.

SUMMARY OF ARGUMENT

Plaintiffs contend that the six-month statute of limitations established in *DelCostello* is inapplicable to their hybrid DFR/breach of contract claim based upon the asserted "facts of this case," cross-pet., p. 12, and *Chauffeurs, Local 391* v. *Terry*, 110 S.Ct. 1339 (1990). The cross-petition finds no support in any post-*DelCostello* decision, including *Terry*, and presents no issue meriting Supreme Court review.

REASONS WHY THE WRIT SHOULD BE DENIED

The Application by the Court Below of *DelCostello* to Plaintiffs' "Hybrid" Duty of Fair Representation/Breach of Contract Claim is Consistent with all Post-*DelCostello* Decisions and Does Not Merit Supreme Court Review

A. In *DelCostello*, this Court held that DFR/breach of contract claims were subject to the six-month limitations period for unfair labor practices ("ULPs") found in section 10(b) of the NLRA, 29 U.S.C. § 160(b). The Court selected this limitations period in light of the close "family resemblance" between ULP and DFR claims, 462 U.S. at 170, and because the § 10(b) six-month period struck the " 'proper balance between the national interests in stable bargaining relationships and finality of private settlements,' " and the interests of employees in remedying the effects of asserted unjust union conduct. *Id.* at 171 (quoting *United Parcel Serv., Inc.* v. *Mitchell*, 459 U.S. 56, 70 (1981) (Stewart, J., concurring)). In addition, application of the six-month period insured promptness and uniformity in the handling of DFR/breach of contract claims. *Id.* at 168-69, 171. The Court rejected application of differing state limitations periods which could result in "radical variation in the treatment of cases that are not significantly different" substantively, *id.* at 166 n.16, tardy challenges to union/employer conduct, *id.* at 168-69, and application of different limi-

tations periods to the two components of a hybrid action. *Id.* at 169 n.19.

B. The lower courts, *contra* cross-pet., pp. 12-14, have uniformly applied *DelCostello* to all DFR claims,[3] even where, unlike here, they have not been joined with claims against employers,[4] or have arisen, as here, under the RLA,[5] or involve allegations regarding union conduct in

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[3] The cross-petition cites no post-*DelCostello* decision of this Court, *contra* cross-pet., p. 11 (heading under "I"), or any lower court decision, which even arguably conflicts with the statute of limitations ruling below.

[4] *Zapp* v. *United Transp. Union*, 879 F.2d 1439, 1441 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 722 (1990); *Ratkosky* v. *United Transp. Union*, 843 F.2d 869, 873 (6th Cir. 1988); *Eatz* v. *DME Unit of Local 3*, 794 F.2d 29, 33 (2d Cir. 1986); *Engelhardt* v. *Consolidated Rail Corp.*, 756 F.2d 1368, 1370 (2d Cir. 1985); *Ranieri* v. *United Transp. Union*, 743 F.2d 598, 600 (7th Cir. 1984); *Erkins* v. *United Steelworkers*, 723 F.2d 837, 838 (11th Cir.), *cert. denied*, 467 U.S. 1243 (1984).

[5] App. A, 11a (decision below); *Kelly* v. *Burlington Northern R.R.*, 896 F.2d 1194, 1197 (4th Cir. 1990); *Alcorn* v. *Burlington Northern R.R.*, 878 F.2d 1105, 1108 (8th Cir. 1989); *Bailey* v. *Chesapeake & Ohio Ry.*, 852 F.2d 185, 186 (6th Cir. 1988); *Smallakoff* v. *Air Line Pilots Ass'n, Int'l*, 825 F.2d 1544, 1546 (11th Cir. 1987); *Triplett* v. *Local 308, Bhd. of Ry. Clerks*, 801 F.2d 700, 702 (4th Cir. 1986); *Brock* v. *Republic Airlines, Inc.*, 776 F.2d 523, 525-26 (5th Cir. 1985); *United Indep. Flight Officers, Inc.* v. *United Air Lines, Inc.*, 756 F.2d 1262, 1269 (7th Cir. 1985); *Welyczko* v. *U.S. Air, Inc.*, 733 F.2d 239, 240 (2d Cir.), *cert. denied*, 469 U.S. 1036 (1984); *Sisco* v. *Consolidated Rail Corp.*, 732 F.2d 1188, 1192 (3d Cir. 1984); *Barnett* v. *United Air Lines, Inc.*, 738 F.2d 358, 363-64 (10th Cir.), *cert. denied*, 469 U.S. 1087 (1984). *See also West* v. *Conrail*, 481 U.S. 35, 38 n.2 (1987) (parties agree that *DelCostello* applies to DFR claim under RLA).

Contra cross-pet., pp. 12, 15, plaintiffs have not and cannot assert a claim under section 301 of the NLRA, 29 U.S.C. § 185, as RLA employers and unions are not subject to the NLRA. 29 U.S.C. §§ 142(3), 152(2), (3). *See, e.g.*, in addition to App. A, 47a (the ruling below); *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 376 (1969); *Fechtelkotter* v. *Air Line Pilots Ass'n, Int'l*, 693 F.2d 899, 903 n.8 (9th Cir. 1982); *United States* v. *Davidoff*, 359 F. Supp. 545, 546-47 (E.D.N.Y. 1973).

negotiating agreements[6] or union misrepresentations.[7] Because a DFR suit "implicates 'those consensual processes that federal labor law is chiefly designed to promote —the formation of the . . . agreement and the private settlement of disputes under it,'" *DelCostello*, 462 U.S. at 171 (citation omitted)—no principled reason exists, and plaintiffs offer none, for applying a different limitations period for DFR actions directed at union conduct in negotiations than where union administration of an agreement is at issue.[8] *See Reed* v. *United Transp. Union*, 109 S.Ct. 621, 628 n.5 (1989) (recognizing *DelCostello* as applicable to union conduct in both negotiations and contract administration); *see also Barton Brands, Ltd.* v. *N.L.R.B.*, 529 F.2d 793, 799 (7th Cir. 1976) (unfair labor practices—to which DFR actions bear "family resemblance," *DelCostello*, 462 U.S. at 170 —reach union conduct in negotiations).[9]

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[6] *Lea* v. *Republic Airlines, Inc.*, 903 F.2d 624, 633-34 (9th Cir. 1990); *Zapp*, 879 F.2d at 1441; *Alcorn*, 878 F.2d at 1108; *Legutko* v. *Local 816, Int'l Bhd. of Teamsters*, 853 F.2d 1046, 1051 (2d Cir. 1988); *Ratkosky*, 843 F.2d at 873-74; *Bailey*, 852 F.2d at 187; *Eatz*, 794 F.2d at 33; *United Indep. Flight Officers*, 756 F.2d at 1271; *Engelhardt*, 756 F.2d at 1369; *Erkins*, 723 F.2d at 838.

[7] *E.g., Erkins*, 723 F.2d at 837; *Ray* v. *W.S. Dickey Clay Mfg. Co.*, 584 F. Supp. 1225, 1227 (D. Kan. 1984).

[8] Plaintiffs assert that *DelCostello* should not apply because plaintiffs were denied the opportunity "to bargain" or otherwise "settle" with their employer, cross-pet., p. 13, but negotiations between employers and individual employees are barred as a matter of law where, as here, there is a recognized bargaining representative. *Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U.S. 50, 62, 67-70 (1975); *Order of R.R. Tel.* v. *Railway Express Agency*, 321 U.S. 342, 347 (1944); *J.I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332, 335-36 (1944).

[9] While plaintiffs claim that the limitations ruling below leaves them remediless, cross-pet., pp. 11-12, the Fifth Circuit, by its treatment of the RICO claim, has permitted plaintiffs to bypass the limitations bar, and potentially to secure three times the damages they sought through their time-barred DFR claim, by simply repackaging

C. Contrary to plaintiffs' cross-petition, pp. 14-16, nothing in *Terry* addresses or "revisits," let alone purports to replace, alter or "reconsider" the holding of *DelCostello*.[10] The issue in *Terry*—whether an employee who seeks backpay in a DFR action "has a right to trial by jury," 110 S.Ct. at 1342—required the Court to "look for an analogous cause of action that existed in the 18th century." *Id.* at 1345. The Court neither stated nor suggested that the action to which this analysis led—a beneficiary's suit against a trustee—bore a closer "family resemblance" to a DFR action than an unfair labor practice charge. Because ULPs did not exist in the 18th century, such comparison could not have been made in addressing the jury trial issue in *Terry*.[11]

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it as a RICO action. This result, which directly conflicts with fundamental federal labor law policy and decisions of this Court and other circuits, is addressed in the pending petition for certiorari of ALPA and Huttinger in this action (No. 89-1925).

[10] Plaintiffs' discussion of *Terry* demonstrates the facial inconsistency in the cross-petition. In part I, plaintiffs argue not that *DelCostello* is dead law, but that it only applies to union conduct in administering a contract, which is exactly what was at issue in *Terry*. 110 S.Ct. at 1343. The thrust of Part II of the cross-petition is that *Terry* overrules *DelCostello sub silentio* in all DFR contexts.

[11] Decisions pre-dating *Terry* which upheld a right to jury trial in a DFR action considered the *DelCostello* statute of limitations analysis to have "no application to an issue of the right to trial by jury." *Terry* v. *Chauffeurs, Local 391*, 863 F.2d 334, 338 (4th Cir. 1988), *aff'd*, 110 S.Ct. 1339 (1990). *Accord Quinn* v. *Digiulian*, 739 F.2d 637, 646 (D.C. Cir. 1984); *Nicely* v. *USX*, 709 F. Supp. 646, 650-51 (W.D. Pa. 1989); *Massey* v. *Whittaker Corp.*, 661 F. Supp. 1151, 1153 n.2 (N.D. Ohio 1987); *Palmer* v. *Metro-North Commuter R.R.*, 661 F. Supp. 1178, 1179 (S.D.N.Y. 1987); *Grider* v. *C.V. Monin*, 637 F. Supp. 324, 326 (M.D. Tenn. 1986).

Since *Terry*, the lower courts have continued to apply the six-month limitations period to DFR claims. *E.g.*, *Lea*, 903 F.2d at 633-34; *Lucas* v. *Mountain States Tel. & Tel.*, 134 L.R.R.M. (BNA) 3065, 3065-66 (10th Cir. 1990) (per curiam); *Ostojic* v. *National Cleaning Co.*, 736 F. Supp. 177, 179 (N.D. Ill. 1990).

Further, regardless of the similarity between a beneficiary's action against a trustee and a DFR action, the former still "suffers from objections peculiar to the realities of labor relations and litigation," as noted in *DelCostello*, 462 U.S. at 167. For example, the Court there found a three-year malpractice limitations period unacceptably long. *Id.* at 168-69. While the Louisiana trust statute which plaintiffs seek to substitute for the *DelCostello* period has a one-year limitations period, La. Rev. Stat. Ann. § 9:2234 (West 1965 & Supp. 1990), other states apply far lengthier limitations periods to such actions.[12] Moreover, because a trust action is not analogous to a breach of contract claim against an employer, the latter would be subject to a different limitations period than applicable, under plaintiffs' proposal, to the DFR half of the hybrid action, a result *DelCostello* found unacceptable. 462 U.S. at 169 n.19. *See also Reed*, 109 S.Ct. at 627 n.4 ("important" consideration in *DelCostello* in departing from "normal practice of borrowing state statute of limitations" was that a hybrid action "yokes together interdependent claims that could only very impractically be treated as governed by different statutes of limitations").

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[12] *E.g., 10 year limitations period:* Ga. Code § 9-3-27 (Michie 1982); Miss. Code Ann. § 15-1-39 (Lawyers' Coop. 1972) (for equitable actions); *see Wholey* v. *Cal-Maine Foods, Inc.*, 530 So.2d 136, 139 (Miss. Sup. Ct. 1988); *6 years*: Minn. Stat. Ann. § 541.05 subd. 1(7) (West 1988); New York—*see Public Serv. Co.* v. *Chase Manhattan Bank*, 577 F. Supp. 92, 109 (S.D.N.Y. 1983); *Lonengard* v. *Santa Fe Indus.*, 70 N.Y.2d 262, 267, 519 N.Y.S.2d 801, 804 (1987); *3 or 4 years* (depending on factual circumstances): Cal. Prob. Code § 16460 and Leg. Committee Comment (West Supp. 1989); Cal. Proc. § 343 (West 1981); *3 years*: Colo. Rev. Stat. Ann. § 13-80-101(f) (Branford 1987); Wash. Rev. Code Ann. § 11.96.060 (West 1987); North Carolina—*see Tyson* v. *North Car. Nat'l Bank*, 305 N.C. 136, 286 S.E.2d 561, 565 (1982).

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

* * * *

National Labor Relations Act, 29 U.S.C. § 141 et seq.:

29 U.S.C. § 142. Definitions

When used in this chapter—

* * * *

(3) The terms "commerce", "labor disputes", "employer", "employee", "labor organization", "representative", "person", and "supervisor" shall have the same meaning as when used in subchapter II of this chapter.

* * * *

Subchapter II—National Labor Relations

* * * *

29 U.S.C. § 152. Definitions

When used in this subchapter—

* * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

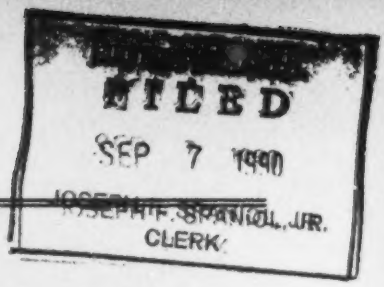
(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor

practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

* * * *

(3)

No. 90-189



In The

Supreme Court of the United States

October Term, 1990

FRANK LANDRY, et al.,

Cross-Petitioners,

v.

TACA INTERNATIONAL AIRLINES, S.A.,
AIR LINE PILOTS ASSOCIATION, INT'L, AFL-CIO,
and CHARLES J. HUTTINGER

Cross-Respondents.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF CROSS-RESPONDENT TACA INTERNATIONAL AIRLINES, S.A. IN OPPOSITION TO THE CROSS-PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

SINCE THE SIX-MONTH LIMITATION ESTABLISHED IN *DEL COSTELLO v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS*, 462 U.S. 151 (1983) EXPIRED, DID THE COURT BELOW PROPERLY BAR PLAINTIFFS' SUIT AGAINST THEIR UNION FOR BREACH OF FAIR REPRESENTATION AND THEIR EMPLOYER FOR ENTERING INTO A COLLECTIVE BARGAINING AGREEMENT, WHICH PLAINTIFFS BENEFITTED FROM DUE TO THEIR ELECTION UNDER THE AGREEMENT TO OBTAIN THE VERY RESULT OF WHICH PLAINTIFFS COMPLAIN?

LIST OF PARTIES TO THE PROCEEDING

TACA International Airlines, S.A. ("TACA") was a Defendant in the District Court and an Appellee in the Court of Appeals. TACA is Respondent and Cross-Respondent in this Court.

Air Line Pilots Association, International AFL-CIO ("ALPA") and Charles J. Huttinger ("Huttinger") were Defendants in the District Court, Appellees in the Court of Appeals, and are Petitioners and Cross-Respondents in this Court.

Fringe Benefit Administrators, Ltd. was a Defendant in the District Court, an Intervenor in the Court of Appeals, and is a Respondent and Cross-Respondent in this Court.

Plaintiffs in the District Court, Appellants in the Court of Appeals, and Respondents and Cross-Petitioners in this Court are: Frank Landry, Jules Corona, Charles South, Robert A. Massa, Don Johnson, T.Q. Howard, Joe Hass, Walter Keller, Don Jenkins, Emile Cerisier, and M. Letona ("Plaintiffs"). The following were plaintiffs in the District Court but were not Appellants in the Court of Appeals and are not Respondents or Cross-Petitioners in this Court: Thomas Brignac, Robert Lukenbill, Bert Haffner, and Gary Zyriek.

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No. 90-189

In The

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FRANK LANDRY, et al.,

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v.

TACA INTERNATIONAL AIRLINES, S.A.,
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and CHARLES J. HUTTINGER

Cross-Respondents.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF CROSS-RESPONDENT TACA INTERNATIONAL AIRLINES, S.A. IN OPPOSITION TO THE CROSS-PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of Court of Appeals is reported at 901 F.2d 404, and is reproduced at App. A.[1] The opinions of

[1] "App. ___" refers to the Appendix annexed to the Petition for a Writ of Certiorari submitted by ALPA and Huttinger in this case. (No. 89-1925). "R.___" refers to the record on appeal.

the Court of Appeals on petitions for rehearing are reported at 901 F.2d 404, 487, and are reproduced at App. H and App. I. The unreported opinions of the United States District Court for the Eastern District of Louisiana are reproduced at App. C through App. E. In addition to the foregoing, TACA and ALPA were involved in prior litigation which is relevant, and is referenced here, and officially reported as: *Air Line Pilots Association, Int'l, AFL-CIO v. TACA International Airlines, S.A.*, Civil No. 83-6238 (E.D. La.), *affirmed Air Line Pilots Association, Int'l, AFL-CIO v. TACA International Airlines, S.A.*, 748 F.2d 965 (5th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985) (hereafter referred to as *"ALPA v. TACA"*).

STATUTE INVOLVED

Section 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(b), is reproduced in the Cross-Petitioner's Appendix at pages BB4 and BB5.

STATEMENT OF THE CASE

Pursuant to Rule 15.1, TACA takes issue with the Statement of the Case submitted by Plaintiffs, as Cross-Petitioners, and therefore has set forth below the following relevant factual background (with references to the record):

TACA is the international airline of El Salvador. *ALPA v. TACA*, 748 F.2d 965 at 967 (5th Cir. 1984). *See also* App. A, 2a. In 1969 shortly after TACA entered into its

first agreement with ALPA, the Republic of El Salvador requested TACA to relocate its pilot base from New Orleans to El Salvador. *ALPA v. TACA, supra* and App. A, 2a. When TACA began compliance with the request, ALPA sought and obtained an injunction, maintaining that if the relocation occurred the collective bargaining agreement would be abrogated by Salvadoran law which would bar ALPA's representation of the pilots. *ALPA v. TACA, supra* and App. A, 2a. The Court of Appeals affirmed the District Court injunction, holding that the pilot base dispute was a "major dispute" which was subject to the Court's jurisdiction. *ALPA v. TACA, supra* and App. A, 2a.

In October of 1979, TACA and ALPA entered into a collective bargaining agreement which was amendable as of December 31, 1983. *ALPA v. TACA, supra,* at 968 and App. A, 3a. On April 19, 1982 the governments of the United States and El Salvador executed a Civil Aviation Agreement designed to regulate and promote air transportation between the two countries. *ALPA v. TACA, supra.* In October of 1983, TACA and ALPA in accordance with the collective bargaining agreement terms as to duration, commenced re-negotiations. *ALPA v. TACA, supra.*

However, on December 20, 1983 the Republic of El Salvador adopted a new Constitution; Article 110, § 4 of that Constitution provided that Salvadoran public service companies will have their work center and base of operations in El Salvador. *ALPA v. TACA, supra* and App. A, 3a.

As a result, on the following day the Salvadoran Ministry of Labor officials ordered TACA to remove its

pilot base to El Salvador. TACA immediately notified its pilots that the base would be moved; new individual contracts including substantial changes would be executed; and ALPA could no longer be recognized as the pilots' bargaining agent. Pilots were given until December 31, 1983 to accept the new terms or lose their employment with TACA. Meanwhile, because of the potential that the pilots would not move, TACA began advertising for new pilots; and ALPA sought injunctive relief which was granted by the Federal District Court. *ALPA v. TACA, supra* and App. A, 3a.

The Court of Appeals affirmed the injunction, ruling that collective bargaining "with the pilots choice of ALPA as their bargaining agent" (*ALPA v. TACA*, at 967) must occur. The Court also noted that in "an Oliver Wendell Holmes lecture at Harvard Law School, entitled 'Reason, Contract, and Law in Labor Relations,' " Dean Harry Schulman had observed that:

> "Collective bargaining is today, as Brandeis pointed out, the means of establishing industrial democracy as the essential condition of political democracy, the means of providing for the workers' lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens."

ALPA v. TACA, at 968.

As a result the Court of Appeals rejected TACA's position that "relocation of its pilot base is authorized by the Air Transportation Agreement, an Executive Agreement" which provided for an arbitration mechanism. *ALPA v. TACA*, at 968-969. In addition, notwithstanding the act of state doctrine and the participation of the

Republic of El Salvador in support of TACA's position (by virtue of filing an *amicus curiae* brief, *see ALPA v. TACA*, at 967), explaining the change in the relationship between TACA and ALPA due to the Republic of El Salvador's mandate, the Court of Appeals ruled that modification in the collective bargaining agreement "must be made in a manner consistent with controlling provisions of United States law, specifically and primarily the Railway Labor Act." *ALPA v. TACA*, at 971.

The Court of Appeals confirmed that it was not preventing the relocation of TACA's pilot base but, rather, requiring "collective bargaining" which was a "cornerstone of our national labor policy", ruling:

> "We neither hold nor suggest that TACA may not relocate its pilot base. We hold only that TACA must relocate its pilot base, and effect the other intended steps in accordance with the substantive law and procedures set forth in the Railway Labor Act and other relevant domestic laws."

ALPA v. TACA, at 972 and App. A, 3a-4a.

Prior to, and after the foregoing Court of Appeals ruling (and denial of *certiorari* by this Court), TACA and ALPA bargained under the auspices of the National Mediation Board. App. A, 4a. TACA and ALPA on July 24, 1985, the eve of a release by the National Mediation Board, reached an agreement. App. A, 4a.

Plaintiffs are pilots who were provided under the agreement reached with the option of continuing to fly with TACA from the pilot base to be relocated in El Salvador, or opting to terminate their employment and to receive severance, pass and other benefits. App. A, 4a. Plaintiffs opted to obtain such severance pay and benefits, payable only under the agreement which they now

complain of; and, thereafter Plaintiffs processed grievances under the agreement (which they now complain of) to an ultimate settlement which enabled them to receive additional monies. App. A, 4a-5a. *See also* App. B, 73a. Plaintiffs delayed more than a year from the date of the agreement under which they opted to obtain and accepted severance pay and other benefits (and more than six months after the conclusion of the arbitration proceedings and a settlement agreement which enabled them to obtain additional benefits). Then, Plaintiffs instituted the litigation which was barred by the Court of Appeals below, in the decision of which Plaintiffs complain. App. A, 5a-18a.

Plaintiffs in the proceedings below maintained that:

1. ALPA breached its duty of fair representation. Plaintiffs asserted that in the course of the negotiations, pilots engaged in sabotage of equipment. Plaintiffs repackaged their hybrid labor law claims as RICO allegations; Plaintiffs asserted they were aware of, and observed (and participated in), alleged sabotage, which they did not previously object to, or notify TACA (or any other party) of, despite Plaintiffs' prior alleged knowledge.[2]

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[2] Plaintiffs' complaint alleged that "within a span of approximately two months five aircraft engines on separate TACA in-service planes were purposely damaged either directly or at the instruction and encouragement of two of the ALPA member pilots who were not plaintiffs to this complaint." Complaint, paragraph 16 (R. 7). Plaintiffs alleged their knowledge of a conspiracy to sabotage planes of TACA, which not only damaged TACA equipment but risked lives of all aboard the aircraft. Plaintiff Emile Cerisier submitted a Declaration dated December 7, 1986 in which he stated that in "the

(Continued on following page)

Plaintiffs also alleged, without any factual support, that TACA entered into an agreement that it would not sue ALPA (and pilots),[3] if ALPA would enter into

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(Continued from previous page)

Spring of 1985" prior to the agreement when he was flying as a "co-pilot on a TACA flight" he observed a pilot "flying as captain of that flight" (not named as a plaintiff or a defendant) perform "several in-flight and ground acts that could have caused damage to the aircraft engines which would have put the lives of the passengers, crew, and ground personnel in danger." (R. 300). Plaintiff Cerisier outlined in his Declaration in paragraph 3 (R. 300) actions which he claimed "caused" use of "an excessive amount of fuel" at great cost to TACA; involved deliberate throwing away of an "oil cap of one of the engines which could have grounded the airplane"; involved leaving "the takeoff power in excess of the rated 5 minutes, which casues [sic] the engine to overheat"; involved deliberate use of an "engine igniters" which could cause the "igniters to burn up and prevent a relight of the engines." (R. 300-301).

Plaintiff Cerisier did not in any way indicate that TACA had knowledge of such observations prior to the service of his affidavit on TACA. Plaintiffs never explained why they could come forward only later during their litigation with such allegations as to what they observed but did not report this type of conduct when it occurred, or could have been prevented.

Plaintiffs never sought relief which would require that Plaintiffs and others return the monies that they took as severance pay (or pay the necessary damages to make TACA whole for the alleged acts of sabotage which they have described in their affidavits).

[3] There is no evidence that any such agreement not to sue was entered into by TACA. TACA has never waived any rights it may have to sue ALPA and each and every Plaintiff or pilot or person in any way involved in sabotage or improper destruction of TACA property. However, for purposes of argument it was assumed in connection with the motion of TACA

(Continued on following page)

an agreement allowing the relocation of the pilot base and the termination of the existing collective bargaining agreement.[4]

2. Plaintiffs alleged that the agreement to eliminate the funding of the pension (as well as the failure to establish a pension, which under the agreement between TACA and ALPA was the obligation of ALPA *see* R. 114-117 and App. A, 21a at n. 33, paragraph 5), was a breach of ERISA. *See* for Plaintiffs' allegations R. 11-14.

TACA and ALPA filed motions to dismiss (and in the case of ALPA in the alternative for summary judgment). TACA maintained that:

1. Plaintiffs' Complaint which was filed on July 23, 1986 to challenge the agreement entered into on July 24,

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(Continued from previous page)

to dismiss that such an agreement not to sue existed. If it had existed (which is contrary to fact) TACA submits any such agreement would have been a benefit for Plaintiffs (in that their allegations and affidavits establish their exposure to tremendous liability). TACA did not before, and does not, now in any way waive its rights against Plaintiffs or any other party or person.

[4] The allegations of Plaintiff Robert A. Massa that ALPA deliberately postponed negotiations with TACA to force a termination buy-out, demonstrate that if the negotiations had occurred faster (and there had been a release, TACA might have been able to relocate without the need for a termination buy-out (R. 359). They do not suggest that the "buyout" agreement of July 1985, under which Plaintiffs all opted to accept (and received substantial severance pay and benefits in 1985) or the subsequent settlement were a secret. *See* App. 5a; R. 67-69.

1985 (almost a year earlier) and the settlement of grievances under that agreement, on December 17, 1985, was precluded by the applicable six months statute of limitations.

2. TACA had no obligation to continue payments to a pension; and, as a practical matter, the administration of the pension had nothing to do with TACA, since it was not a fiduciary nor a party to the arrangements establishing the pension. *See* App. A, 21a at n. 33, paragraph 5 and R. 114-117; 129-183.[5]

TACA, as the record demonstrates, negotiated as an employer with ALPA, a union. TACA lacked control over

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[5] TACA's arrangement with regard to funding a retirement plan, specifically provided that TACA was only to make contributions based upon certain circumstances, in which a pilot crew member had been eliminated (App. A, 20a-21a and *see* 21a, n. 33; R. 114-117). The funding which Plaintiffs maintain TACA had an obligation to continue beyond the agreement arose out of an agreement which reduced the flight deck crew members and, in return, created solely as a collective bargaining agreement obligation of TACA an extra fixed payment requirement (App. 21a, n. 33; R. 114-117).

The payment obligation of TACA was only to submit defined contributions. ALPA specifically was charged with determining specifics of the plan fund. TACA had no role in determining how, or when, any pension fund might be established. *See* paragraph 5 of the agreement (App. A, 21a-22a, and 22a, at n. 33, paragraphs 5 and 6; R. 116). TACA was neither a signatory nor a party to the plan agreement, establishing the plan (App. A, 33a; R. 183). ALPA maintained that it selected a fiduciary, ultimately Fringe Benefit Administrators, Ltd. and ALPA was removed from the administration and maintenance of the fund (which was delegated to the fiduciary).

the representatives designated by ALPA for the purpose of bargaining. Not merely Huttinger, but other representatives including John Bradley,[6] a contract administrator from ALPA, negotiated with TACA. The negotiations involved were under the auspices and direction of the National Mediation Board. *See* R. 75-76 and App. A, 4a; and, for Plaintiffs' confirmation that mediator Charles Callahan of the National Mediation Board conducted the negotiations, *see* (R. 319 and 324). Plaintiffs never claimed that TACA selected, or could have selected representatives, for ALPA. TACA maintained below that, as a matter of law, it had no control over bargaining representatives of ALPA.

With regard to all actions of ALPA and Huttinger, Plaintiffs were in a position to complain at any time during negotiations. Plaintiffs were free at the time of the collective bargaining agreement on July 24, 1985 which was communicated to them by TACA (App. A, 4a,

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[6] The alleged election irregularities were all time-barred. As to those asserted irregularities relating to Huttinger, ALPA indicated that there were no irregularities. *See* Second Declaration of John Bradley (R. 353-354) confirming that Plaintiffs were confused between the nomination process and the election and there were no irregularities. However, even assuming there were irregularities, for the purpose of argument, the elections of Huttinger referred to were in February and July of 1985, which confirmed the allegations were time-barred. It is difficult to understand how TACA can be accused of improper concealment of activities involving elections in which Plaintiffs engaged (and would have first hand knowledge of), or how TACA would be able to reject any representative that Plaintiffs sent to the bargaining table, in view of the labor law which precludes management from objecting to the representatives of labor and this Court's specific ruling requiring bargaining with ALPA. *ALPA v. TACA*, at 967.

14a-15a; and E, 92a; R. 504) to opt to terminate their employment and accept monies for severance pay (as they did), or to continue their employment. App. E, 92a-93a. Plaintiffs are all individuals who specifically refused to continue to fly for TACA. Plaintiffs demanded that they be paid, and received, severance pay and benefits (App. A, 5a) (in excess of $400,000.00). Plaintiffs demonstrated that they were aware of the nature of the arrangements and agreements reached by virtue of their demands for the severance pay and benefits and their additional grievances (under the agreement now complained of) enabling them to obtain additional monies (App. A, 5a; R. 185-190).

TACA and ALPA after further proceedings moved for dismissal or, in the alternative, for summary judgment. TACA noted among other points that the parties could have bargained through impasse and exhausted procedures under the Railway Labor Act, at which point TACA could have effected relocation of its pilot base without providing any financial payments. In that case, Plaintiffs would not have received anything other than the right to strike and walk a picket line. *See* R. 591.

The District Court in its rulings found Plaintiffs' claims in issue here time-barred. App. E, 95a. The District Court also ruled, among other findings relevant here that many of Plaintiffs' RICO allegations related to their time-barred, hybrid labor law claims (App. B, 73a; R. 1299).

The District Court also concluded that Plaintiffs' allegations that ALPA engaged in improper activities "for the

benefit of the union" and, then, was placed in a position of being "pressured" by TACA to agree to the relocation could not constitute a basis for Plaintiffs to seek relief. App. B, 78a. In addition, the District Court and the Court of Appeals noted that the alleged sabotage (which Plaintiffs argued that they observed, but TACA maintained would make them co-conspirators) had involved damage to TACA and as alleged by Plaintiffs "was intended to provide the pilots with an advantage in the form of bargaining concessions. It was not intended to deprive them of any rights". App. A, 45a. As a result Plaintiffs would not have sustained a "direct injury" which would enable them to proceed. (R. 1304).

The Court of Appeals affirmed the decision of the District Court and the grant of summary judgment to ALPA and TACA on the duty of fair representation and breach of contract claim on limitations grounds. The Court of Appeals ruled: "A straight-forward application of *Del Costello*, as it has evolved, compels this result." (App. A, 18a). The Court of Appeals also affirmed the District Court's determination that there were no grounds for equitably tolling the limitations (App. A, 15a-16a), or reopening the earlier litigation between TACA and ALPA (App. A. 16a-17a) or permitting Plaintiffs to avoid the limitations bar by trying to re-characterize the Defendants' actions as an improper decertification of ALPA as a bargaining representative (since even if arguably this could be asserted, it was within the exclusive jurisdiction of the National Mediation Board, which had supervised the negotiations complained of by Plaintiffs) (App. A, 17a and 18a).

The Court of Appeals dismissed the RICO claim against TACA but reversed as to ALPA and Huttinger. The Court of Appeals reversed the grounds of summary judgment on the ERISA claim as to ALPA and TACA.[7]

The Court of Appeals also granted in part and denied in part a petition for rehearing that was filed by ALPA and Huttinger with regard to matters that are not relevant here and also denied petition for rehearing filed by TACA.

SUMMARY OF THE ARGUMENT

Plaintiffs' assertion that the six-month limitation period provided for under *Del Costello* is inapplicable to their suit, based on facts involved here and *Chauffeurs, Teamsters and Helpers, Local 391 v. Terry*, 110 S.Ct. 1339 (1990), is incorrect. *Del Costello* and subsequent cases have recognized no such basis for distinction as is asserted by Plaintiffs here (nor do Plaintiffs cite any such cases). Plaintiffs are deliberately confusing the right to a jury trial, mandated by constitutional law, with their request for application of diverse and differing state limitations period. The *Del Costello* limitations period is mandated by national labor law, which is not in any way

[7] The Court of Appeals noted that although TACA was only obligated to make contributions, and under the agreement ALPA had the responsibility for setting up and administering the pension, there could be a question of fact to be explored on remand – as to whether TACA "undertook actual obligations" under Section 9.9 or any other Section of the plan. App. A, 33a at n. 52.

inconsistent with the type of remedy-characterization used to determine a constitutional right to trial by jury in *Terry, supra*. With respect to constitutional considerations, a uniform federal limitations period would be required to ensure the supremacy of the federal labor laws. Thus, Plaintiffs' argument for review here is based upon improper confusion of the constitutional right to trial by jury and Plaintiffs' result-oriented effort to apply varying state limitations statutes to the Railway Labor Act to avoid a uniform federal limitations bar to their claims. Plaintiffs' argument is also precluded by the constitutional considerations which this Court has previously confirmed to be the basis for uniform federal labor law in *Del Costello*.

REASONS WHY THE WRIT SHOULD BE DENIED

I. *DEL COSTELLO* IS APPLICABLE TO PLAINTIFFS' HYBRID DUTY OF FAIR REPRESENTATION AND BREACH OF CONTRACT CLAIM.

Plaintiffs have not provided any basis for requesting reconsideration, or destruction, of the *Del Costello* limitations period.

A. In *Del Costello* the six-month limitations period for unfair labor practices, set forth in Section 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(b), was found applicable to duty of fair representation and breach of contract claims for unfair labor practices. The Court found a resemblance between duty of fair representation claims and unfair labor practices. The Court concluded that the six-month limitation established the proper balance between the national interest and

stable bargaining relationships and finality of private settlements, as well as interests of employees in remedying effects of alleged unjust union conduct. The Court rejected arguments "that the Rules of Decisions Act, 28 U.S.C. § 1652 [28 U.S.C.S. § 1652], mandates application of state statutes of limitations whenever Congress has provided none." *Del Costello*, 462 U.S. 159, n. 13. The Court confirmed the importance of uniformity for the purposes of the national labor law because the alternative, which might use state statutes of limitations, could result in a radical variation in the treatment of cases that are not significantly different substantively. 462 U.S. 161.

In federal labor matters under the NLRA, employers can be required to recognize unions in more than one jurisdiction. However, in connection with the Railway Labor Act, there is an even more of an emphasis on interstate, or system-wide, recognition and the need for uniformity. This is because the NLRA establishes an "appropriate unit" at a site-by-site location. While there can be national units under the NLRA, in each case the facts are analyzed to establish an appropriate unit. *See* Section 9, NLRA, 29 U.S.C. § 159. There is no NLRA requirement that a company which is national in scope have a system-wide unit. The Railway Labor Act was designed, and is interpreted by the National Mediation Board, to promote system-wide unionization in groups, which are not referred to as "units" but rather "class or crafts". *See* Rehmus, *The National Mediation Board at 50*, 16 (NMB 1984). The reason for this was that interstate transportation systems if shut down at one location, by definition, are usually systems which come to a total halt. *Ibid.* Shutting down a segment of a railroad line or a hub of an

airline can disrupt an entire system. *Ibid*. Thus, there is a mandate for national and uniform federal labor policy on interstate carriers; and for that reason, even the designating of bargaining groups, or classes or crafts, under the Railway Labor Act was system-wide, to prevent fractionalization of employee groups and to ensure system-wide bargaining units designed to prevent interruptions. *Ibid*. As a result, the Railway Labor Act with its system-wide structure of bargaining favors a national uniform limitations period even more than the NLRA.

B. The application of *Del Costello* to not only the NLRA but the Railway Labor Act has been uniform.[8] There is no distinction between duty of fair representation and breach of contract claims based upon the way by which the Plaintiffs may choose to proceed. Thus, whether the Plaintiffs sue only a union or sue a union and employer, or whether the Plaintiffs complain of processes involving negotiating agreements or enforcement of agreements is irrelevant as to the limitations period. *Del Costello, supra* at 462 U.S. 163. The concept of the duty of

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[8] *See* App. A, 11a and App. E, 95a. *See also Kelly v. Burlington Northern R.R.*, 896 F.2d 1194, 1197 (9th Cir. 1990); *Alcorn v. Burlington Northern R. Co.*, 878 F.2d 1105, 1108 (8th Cir. 1989); *Bailey v. Chesapeake and Ohio Ry. Co.*, 852 F.2d 185, 186-187 (6th Cir. 1988); *Smallakoff v. Air Line Pilots Ass'n Int'l*, 825 F.2d 1544, 1545-1546 (11th Cir. 1987); *Triplett v. Bhd. of Ry. Clerks, Local 308*, 801 F.2d 700, 702 (4th Cir. 1986); *Brock v. Republic Air Lines, Inc.*, 776 F.2d 523, 525-526 (5th Cir. 1985); *United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1269 (7th Cir. 1985); *Welyczko v. U.S. Air, Inc.*, 733 F.2d 2[illegible]40 (2d Cir.), *cert. denied*, 469 U.S. 1036 (1984); *Sisco v. Consolidated Rail Corp.*, 732 F.2d 1188, 1192-1193 (3d Cir. 1984); *Barnett v. United Air Lines, Inc.*, 738 F.2d 358, 362-364 (10th Cir.), *cert. denied*, 469 U.S. 1087 (1984).

fair representation litigation involves the process basic to collective bargaining, the "consensual processes that federal labor law is chiefly designed to promote – the formation of the collective agreement and the private settlement of disputes under it." *See e.g. Del Costello, supra,* at 462 U.S. 163.

There have not been any decisions subsequent to *Del Costello* which in any way suggest the limitations period, Plaintiffs incorrectly argue for here. Plaintiffs fail to cite any support for their arguments seeking review.

II. PLAINTIFFS' RELIANCE ON *TERRY* IS BASED ON THE INCORRECT ASSERTION THAT *TERRY* SUGGESTS A REASON TO REVISIT THE CONCEPT OF THE LIMITATIONS PERIOD IN *DEL COSTELLO* WHILE *TERRY* CONSTRUED A CONSTITUTIONAL RIGHT TO A JURY TRIAL.

This Court in *Terry* found that it was obligated, due to the constitutional right to a jury trial, to analyze a remedy and determine if it were similar to one that might be found at common law. Assuming for the purpose of argument that in *Del Costello* characterization of the remedy did not consider a trust analogy and that *Terry* did, the characterization of the remedy regarding a constitutional right to jury trial does not in any way suggest a need to revisit the application of the federal six-month limitations period. To the contrary, *Terry* involved a constitutional right to a jury trial that has been long regarded as a special constitutional right. *See Terry, supra* 108 L.Ed.2d 527-528; 537-538; and 540 (confirming the constitutional duty to "scrutinize any proposed curtailment of the right to a jury trial"). National labor policy deferred

to the constitutional right to a jury trial but even if, as a result of the recognition of the constitutional right to jury trial it could be argued that a trust analogy might be used, there is no concomitant constitutional mandate that limitations period be re-designed or that state laws be applied to fragment national labor policy. To the contrary, there is no constitutional reference to a limitations period (as there is to a right to jury trial). The concept of a uniform limitations period is consistent with all constitutional concepts that should be considered and is actually mandated by any constitutional considerations if the national labor policy is to be uniform. *See Del Costello,* 462 U.S. 161.

As a practical matter, the national labor relations policies would be fragmented if, depending on location, carriers subject to the Railway Labor Act would be subject to different challenges based upon different state statutes of limitations that might be analogous, or applied. This would result in not only Balkinzation of rights but undermining of the national labor policy. Cases interpreting the preemptive effect of the supremacy clause suggest that if there are constitutional considerations, they mandate the application of a national uniform policy for our labor laws when it comes to selection of the limitations period and preclude the type of revisiting of fragmented policy argued for by Plaintiffs. *See, Del Costello,* 462 U.S. 163.

CONCLUSION

For the foregoing reasons, the Cross-Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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